Filed 12/29/08 In re A.H. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re A.H., a Person Coming Under the Juvenile Court Law.	B200397 (Los Angeles County Super. Ct. No. FJ38083)
THE PEOPLE, Plaintiff and Respondent, v. A.H., Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County. Shep A. Zebberman, Juvenile Court Referee. Affirmed.

Laini Millar Melnick, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Scott A. Tarlye and Beverly K. Falk, Deputy Attorneys General, for Plaintiff and Respondent.

STATEMENT OF THE CASE

On March 9, 2006, the Los Angeles District Attorney filed a petition alleging that A.H. (appellant) was a minor who came within the provisions of Welfare and Institutions Code section 602,[1] in that he resisted an executive officer (Count 1, Pen. Code §69, a felony) he committed battery by gassing (Count 2, Pen. Code §243.9, subd. (a), a felony) and vandalism causing over $400 in damages (Count 3, Pen. Code §594, subd. (a), a felony.) The petition further alleged that each offense was committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist in criminal conduct by gang members (Pen. Code §186.22, subd. (b)(1)(A).)

On April 12, 2006, appellant admitted Counts 1 and 2 of the petition. Count 2 and the special allegation were dismissed pursuant to a case settlement. The petition was sustained, and appellant was declared a ward of the court under section 602. He was ordered suitably placed under various terms and conditions.

On September 27, 2006, appellant was ordered to camp community placement and arrived at Camp Paige on October 3, 2006. In a report dated November 14, 2006, the probation officer informed the court of a gang related physical altercation in which appellant had been involved on October 3, 2006. The probation officer recommended that appellant remain in camp. The probation officer did, however, allege the incident was a violation of probation pursuant to section 777, and appellant was transferred to a camp with mental health components.

On February 2, 2007, the probation officer reported to the court that appellant had been placed at Camp Jarvis on December 18, 2006. Appellant had engaged in two physical altercations upon his arrival and had difficulty following and maintaining structure. However, he had shown slight improvements and attempted to conduct himself

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[1] All further undesignated statutory references are to the Welfare and Institutions Code.

in a productive manner. He was seen by mental health staff and was receiving drug counseling.

On March 23, 2007, the probation officer filed a Notice of Probation Violation pursuant to section 777, alleging that appellant had violated several specific probation conditions: 1, 2, and 15A.[2] Count 1 further alleged that on March 13, 2007, appellant had refused to comply with instructions given by officers and was in possession of contraband. After officers observed appellant with extra clothing, he refused to comply with instructions to remove his T-shirts. When appellant was then commanded to do so, he removed his shirt aggressively and threw it at the officer hitting him on the left shoulder. When the officer attempted to secure appellant, appellant struggled, placed the officer's leg between his legs, and began to squeeze tightly. As a second officer assisted in securing appellant, the officer sustained a stab wound to the upper forearm with a pen that appellant had. In addition, when appellant was secured in mechanical restraints, he spat blood in the area of the officers. Counts 2 and 3 alleged that, on December 21, 2006, appellant was involved in a racial, physical altercation with another ward and that on March 18, 2007, appellant aggressively attacked another ward. A Youth Authority commitment was recommended.

Count 1 alleged that the minor violated conditions 1, 2 and 15A; Count 2 alleged that he violated conditions 1, 2, 9 and 15A; and Count 3 alleged that he violated conditions 1 and 2. Count 2 was dismissed without objection of the District Attorney. After a contested hearing, the juvenile court found that the minor had violated conditions 1 and 2 of his probation, as alleged in Counts 1 and 2, but struck the allegations as to condition 15A. The previous camp placement order was terminated and appellant was

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[2] The conditions of probation are: "1. Obey all laws. Obey all orders of the probation officer and of any court." "2. Obey all instructions and orders of mother, teachers, school officials and placement staff." "9. Attend a school program approved by the Probation Officer. Maintain satisfactory grades and attendance, and citizenship. Promptly notify Probation Officer of every absence." "15A. Do not participate in any type of gang activity."

committed to the Department of Juvenile Justice (DJJ -- formerly the Youth Authority), for a period not to exceed four years and eight months. Appellant was given predisposition credit for 459 days. Subsequently, the court exercised its discretion and ordered a maximum confinement time of three years, with no custody credit.

A timely Notice of Appeal was filed.

STATEMENT OF FACTS

In the evening of March 13, 2007, Deputy Probation Officer Robert Mendez was on duty in a dorm at Camp Jarvis. Around 8:00 p.m., Mendez ordered the dorm to "break down" which means to take off outer clothing, and get into bed under the covers. According to Mendez's testimony, appellant was talking and refused to obey his order. Mendez then noticed that appellant was wearing an extra shirt and told him to remove it. When he did so, he threw it down and Mendez noticed appellant was wearing a third shirt, which he also ordered him to remove. Appellant did so and threw the shirt at Mendez. Mendez did not know whether appellant was cold or whether he had thermals to wear in bed, although he testified that some of the other minors did. Mendez did not ask why he was wearing the extra shirts, just demanded that he remove them.

Mendez grabbed appellant to put him on his bed, and they both fell over the bed onto the floor. Mendez was on top, appellant on the bottom, and one of Mendez's legs was trapped in appellant's. Appellant was face down on the floor. Williams, another probation officer who was searching beds, came over to assist Mendez, and they forced appellant's arms behind his back and handcuffed him. Both officers testified that appellant had struggled and resisted while he was on the floor. Williams saw appellant holding a blue pen, and although he did not feel it happen, he said appellant scratched him arm with the pen during the struggle. When the officers stood appellant up, he was bleeding from his nose. Appellant was taken to the secure housing unit, where, according to Williams, the nurse refused to attend to him, because he was angry and cursing. A Special Incident Report was filed.

Deputy Probation Officer Timothy Hill testified that on March 18, 2007, he was in the dining area when he saw appellant hit another minor, F., on the chin. F. was looking

at appellant, whose hands were handcuffed together. According to Hill's testimony, F. told Hill that appellant asked him what he was looking at and F. said "Looking at you." Appellant then hit F. and F. hit appellant back. A Special Incident Report was filed.

CONTENTIONS ON APPEAL

Appellant's contentions on appeal pertain to his sentencing. As noted above, the court found that appellant had violated conditions 1 and 2 of his conditions of probation, requiring him to obey all laws and orders of the probation officer and of the court and to obey all instructions and orders of his mother, teachers, school officials and placement staff. None of these violations constituted a criminal offense.[3] At the time of his disposition hearing in June 2007, the juvenile court had broad discretion to commit a minor to DJJ under section 731.[4] Shortly after the hearing, section 733 was amended to provide that a ward "shall not be committed" to the DJJ if "the most recent offense alleged in any petition and admitted or found to be true by the court is not described in subdivision (b) of Section 707, unless the offense is a sex offense set forth in paragraph (3) of subdivision of Section 290 of the Penal Code." (§733, subd. (c).) By its own terms, the amendment took effect on September 1, 2007.

Appellant contends the amendment now limits the juvenile court's discretion to order DJJ commitments to only those minors identified in the current version of section 733 because where "a statute mitigating punishment becomes effective after the commission of the prohibited act but before the final judgment, the lesser punishment provided by the new law must be applied in the absence of an express statement to the contrary by the Legislature [citations] . . . ." (*In re Aaron N.* (1977) 70 Cal.App.3d 931, 938.) Appellant makes the additional contention that the juvenile court abused its

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[3] At the time a petition under section 777 was to be filed only when the minor had committed "misconduct" by violating an order of the court or a condition of probation by conduct "not amounting to a crime." (§777, subds. (a)(1) & (a)(2).)

[4] There were two exceptions not relevant to this case: 1) a minor under 11 years of age, and 2) a minor suffering from a life threatening infectious or contagious disease.

discretion in committing him to the DJJ "without granting a continuance to allow his counsel to obtain an updated medical and mental health evaluation to assist the court in determining an appropriate disposition and placement. Appellant contends this was an abuse of discretion because it prevented appellant "from presenting current evidence of his mental condition." Without the benefit of a current report, appellant contends the juvenile court could not fulfill the statutory requirement that the court is "'fully satisfied' that the ward's mental condition is such that he will benefit from commitment" to the DJJ . . . ."

Respondent's contentions are: 1) sections 731and 733 are not applied retroactively; 2) there is no evidence that appellant raised the contention in the juvenile court; and 3) the juvenile court did not abuse its discretion is imposing sentence.

DISCUSSION

Retroactivity

The rule of lenity provides that statutory amendments that ameliorate punishment are given retroactive effect; so the lighter punishment will be imposed. (See, *In re Estrada* (1965) 63 Cal.2d 740, 748.) Appellant argues that this rule requires that current sections 731 and 733 apply to his sentencing because they ameliorate the legal consequences of the appellant's conduct. His argument that the legislative changes have an ameliorative or mitigating affect on his commitment relate to the fact that currently non-section 707, subdivision (b) wards are not eligible for commitment to a state-operated facility[5] and he fits that classification.

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[5] We decline to further join in the discussion regarding whether the sections are ameliorative or not. We acknowledge, and respondent contends, that the amendatory provisions did not change the maximum period of confinement for wards committed to local facilities or affect the amount of confinement time in DJJ. (§731, subd. (c.) However, as a matter of common-sense, it is difficult to agree that a sentence to DJJ is not more severe than the other alternative sentencing options available to the juvenile court judge. We elect to decide this issue solely on the more narrow issue of the evidence of the intent of the Legislature.

However, the general rule is that an amended statute applies prospectively unless the Legislature clearly expresses an intent to the contrary. (*In re Carl N*. (2008) 160 Cal.App.4th 423; *People v. Floyd* (2003) 31 Cal.4th 179, 184.) While it is true that after the effective date the juvenile court may not commit a non-707(b) ward to the DJJ, the Legislature expressed no intent to invalidate all commitments made to the Youth Authority prior to the effective date of the legislation. Further, the Court in *In re Brandon G*. held that these statutes do not apply retroactively because the plain language of section 733 provides that it would be effective on or after September 1, 2007. (*In re Brandon G*. (2008) 160 Cal.App.4th 1076.)

Further supporting the argument that the Legislature did not intend for the provisions to apply retroactively is the fact that the Legislature added specific provisions permitting – but not requiring – the juvenile court to recall commitments for non-section 707, subdivision (b) wards whose commitments to the DJJ predated the legislative changes. (§731.1.) Section 731.1 gives a juvenile court discretion to recall the commitment of a ward "upon the recommendation of the chief probation officer of the county" when the ward's commitment offense was not a section 707, subdivision (b) offense and the ward "remains confined in an institution operated by the [DJJ] on or after September 1, 2007." (§731.1.) By providing that the county may choose to take some or all of the youthful offenders back into county care and custody, the recall is expressly permissive and discretionary, but not mandatory.

Appellant argues that the language of section 731.1 does not indicate "an express legislative intent for only prospective application of the ameliorative changes." We disagree and concur with the analysis of *In re Carl N.*, *supra*, 160 Cal.App.4th 423 and *In re Brandon G.*, *supra*, 160 Cal.App.4th 1076 regarding the retroactivity issue.[6]

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[6] Respondent also argues that appellant's claim that his DJJ commitment is not ripe for review because he did not employ the procedures contained within the amended statute to present his claim to the juvenile court. (§731.1) We agree with appellant that the issue is one of statutory interpretation and it is independent of the recall process described in section 731.1

Abuse of Discretion

On April 12, 2006, on the underlying petition, appellant was ordered suitably placed in a group home. After several unsuccessful placements he arrived at Camp Jarvis where the events described above culminated in the filing of the present section 777 petition.

On May 31, 2007, appellant was sentenced on the section 777 petition to DJJ. At the time of this sentencing, his trial counsel requested the court continue the sentencing in order to "obtain a new medical and mental health evaluation to assist the court in determining an appropriate disposition and placement." At the time of the May 2007 sentencing, the juvenile court had in its possession a 730 evaluation with an assessment date of April 4, 2006.[7] Given the fact that nearly a year had elapsed since the preparation of that report (on April 12, 2007 and again on May 31, 2007), trial counsel requested continuances for the preparation a new mental health evaluation.

Appellant contends that the trial court's failure to grant a continuance to obtain a new mental health report was an abuse of discretion because under section 734 "[n]o ward of the juvenile court shall be committed to the Youth Authority unless the judge of the court is fully satisfied that the mental and physical condition and qualifications of the ward are such as to render it probable that he will be benefitted by the reformatory education discipline or other treatment provided by the Youth Authority." (§734.) Appellant contends that the updated mental health report was required for the court to be "fully satisfied" about the appropriate sentencing decision and the failure to grant a continuance to obtain the report was an abuse of discretion.

Respondent and appellant both agree that the juvenile court's ruling on a motion for a continuance is reviewed for an abuse of discretion, but disagree about the decision of the juvenile court in this instance. We find that the juvenile court's refusal to grant the continuance in this case was not an abuse of discretion. The denial of the continuance

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[7] The record reveals that the juvenile court at the time of the original sentencing did not have this report in his possession.

cannot be examined in a vacuum and must be considered in the context of the entire record in this case. While it is true that the juvenile court had a one-year old mental health evaluation to consider; it is also true that the sentencing judge was the same judge that originally sentenced appellant to a group home in 2006 and had followed the succession of placements that followed. More pertinent to the decision to sentence appellant to DJJ was the history and description of his behavior while in the camp system.

At the time of sentencing the juvenile court noted that it was denying the motion for a continuance and stated further:

> "Well, I have taken into consideration the underlying offense. He basically has one 602 petition. I have taken that into consideration. I gave him a try at suitable placement, which was, I recall very clearly against my better judgment. It was agreed upon disposition that I went along with, although I didn't think it was in his best at the time. It didn't last that long, and he went to various degrees of camp program after that. And even though he has one sustained 602 petition, he has a series of violations and a lengthy history of violence that did not necessarily result always in violations, leading up to the last violation which he basically attacked and stabbed a probation officer [¶] . . . [¶] with a pen. I recall a scar of somewhere around four to five inches is my recollection, and it was a stabbing nonetheless, and a serious stabbing, and appears to me I'm also taking into consideration his age, his educational needs, and so [as] I see it realistically speaking I have [these] options: home on probation, which I'm not giving a lot of consideration to; Camp, which I've tried several times unsuccessfully; county jail, which I don't think he's going to get anything he needs other than warehousing and keeping him away from the community; and California Youth Authority, which I believe he will have services to address his needs, and I think that's the appropriate disposition. I'm going to make that order."

Given this statement of reasons, the juvenile court's decision to send appellant to DJJ was not an abuse of discretion. As the court stated, he had tried virtually every other possible

option: without success. At this juncture, the juvenile court was fully entitled to sentence appellant to DJJ and the failure to obtain an updated mental health report was not an abuse of discretion.

We also note further that appellant's mental health issues had been previously noted by the court and prior placements had taken his medical needs into account. For example on November 15, 2006, the juvenile court judge signed an order which provided in part: "Minor to be transferred to Challenger to continue camp program at a camp with mental health components." The record thus supports the conclusion that the juvenile court judge had previously attempted to fashion a placement which considered appellant's special mental health needs. The judge was required to give appellant's mental health needs appropriate consideration and the record reflects this occurred. There was no abuse of discretion.

DISPOSITION

The judgment is affirmed.

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COOPER, P. J.

We concur:

RUBIN, J.

BIGELOW, J.